IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. [illegible]

SUSAN G. REEVES,

Petitioner,

v.

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

TABLE OF CASES

STATUTES

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The petitioner, Susan G. Reeves, prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case on the 7th day of October, 1941 (R. 55), which dismissed the petitioner's appeal to that Court upon the basis that the appeal was taken from a judgment of the District Court of the United States for the Southern District of Florida which was not final.

Opinion Below

No opinion was rendered by the Circuit Court of Appeals other than the statement in the minutes of the Court for October 7, 1941, that the appeal was dismissed on the grounds that the judgment appealed from was not final (R. 55). No opinion was rendered by District Judge Hugh Akerman who signed the judgment of the District Court of the United States for the Southern District of Florida

from which the appeal was taken, and which judgment was in terms designated as a "final judgment" (R. 47-48).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended. No question is involved under the Constitution or Statutes of the United States, and the jurisdiction of the Courts below was based solely on diversity of citizenship.

Question Presented

The only question presented to this Court is whether the judgment of the United States District Court for the Southern District of Florida (R. 47-48) dismissing Count II of petitioner's complaint and directing that petitioner "go hence without day" as to said court was a final judgment from which an appeal could be taken to the Circuit Court of Appeals.

Statement

The petitioner's complaint contains three counts, viz: Count I, an action by the petitioner against the respondent Beardall on a promissory note; Count II, an action by the appellant against the respondent for specific performance of a promise not to change a will, or in the alternative for damages equal to the net value of the estate; and Count III, an action for an accounting against defendant Hamer (R. 1-6, 38-39). The two separate and distinct claims against the respondent were joined as independent claims under the provisions of Rule 18(a) of the new Rules of Civil Procedure. The claim against the defendant Hamer was included in the complaint under the provisions of Rule 18(b). Count I of the complaint involves the obligation of the respondent's testatrix on her promissory note. Count II of the complaint involves the validity of a contract between the petitioner and respondent's testatrix and the liability of the latter's estate for claimed breach of such contract. Separate transactions are involved and the relief sought as to each count is separate and distinct. Respondent filed an answer to Count I and moved to dismiss Count II (R.

43-45). (The answer to Count I was not included in the record before the Circuit Court of Appeals or in the record before this Court.) The motion to dismiss Count II was granted (R. 46-47), and a judgment designated as a "final judgment" dismissing Count II of the complaint was signed by the District Judge (R. 47-48).

An appeal from the "final judgment" of the District Court was taken to the United States Circuit Court of Appeals for the Fifth Circuit (R. 48-49) and when the appeal came on to be heard the United States Circuit Court of Appeals for the Fifth Circuit dismissed the appeal, without listening to argument on the merits, upon the basis that the appeal was from a judgment that was not final (R. 55). Petitioner filed a petition with the Circuit Court of Appeals for rehearing (R. 56-58), in which the attorney for the respondent joined (R. 59), as he too believed that the judgment appealed from was final and appealable. The petition for a rehearing was denied by the Circuit Court of Appeals without opinion (R. 60).

Error to be Urged

Petitioner urges that the Circuit Court of Appeals for the Fifth Circuit erred in holding that the judgment from which the appeal was taken was not final.

Reasons for Granting the Writ

In addition to the error which the petitioner urges was made by the Circuit Court of Appeals in dismissing the petition, the petitioner urges that her petition for writ of certiorari should be granted because the decision of the Circuit Court of Appeals for the Fifth Circuit in dismissing the appeal appears to be in flat contradiction to the principle of law set forth by the Circuit Court of Appeals for the Second Circuit in *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (1939). In that case the Circuit Court of Appeals for the Second Circuit held that a judgment dismissing one of two separate and distinct causes

of action between the same plaintiff and defendant was a final judgment from which an appeal did lie. The principle enunciated by the Circuit Court of Appeals for the Second Circuit appears also to have been accepted by the Circuit Court of Appeals for the Fourth Circuit in *Bowles v. Commercial Casualty Ins. Co.*, 107 F. (2d) 169 (1939), and by the Circuit Court of Appeals, Seventh Circuit, in *Florian v. U. S.*, 114 F. (2d) 990 (1940). It is respectfully submitted that the principles of appellate jurisdiction involved in the decision of the Circuit Court of Appeals for the Fifth Circuit in dismissing Count II of the petitioner's complaint should be reviewed and clarified by this Court in view of the apparent conflict between the decision of that Court and the decision of the other circuit courts of appeals mentioned above.

Returning to the question of the finality of the judgment in the District Court (R. 47-48) it is the position of the petitioner that since the Rules of Civil Procedure in Rule 18(a) permit joinder of independent claims and in Rule 54(b) provide for the entry of a judgment disposing of one among several claims at any stage in a proceeding, the judgment appealed from was a final judgment from which the appeal properly lay. That judgment completely disposed of the plaintiff's claim under Count II of the complaint without reference to any further action of the court below as to the other counts of the complaint.

While it was in the discretion of the District Court whether or not an order and judgment dismissing Count II should have been entered, it is respectfully submitted that by entering the order and judgment the Court did make a final disposition of Count II in the form of a final judgment from which an appeal would lie.

WHEREFORE, it is respectfully submitted that this petition should be granted.

SUSAN G. REEVES,
Petitioner,
By DANIEL BURKE,
Her Counsel.

BRIEF IN SUPPORT OF PETITION

The complaint herein contains three counts, viz.: Count I—an action by the appellant against the appellee Beardall on a promissory note; Count II—an action by the appellant against the appellee Beardall for specific performance of a contract not to change a will or, in the alternative, for damages equal to the net value of the estate; and Count III—an action for an accounting against defendant Hamer (R. 1-6, 38-39). The two separate and distinct claims against the appellee Beardall are joined as independent claims under the provisions of Rule 18. (a) of the new Rules of Civil Procedure. The claim against the defendant Hamer is included in the complaint under the provisions of Rule 18. (b).

Count I and Count II of the complaint involve entirely separate and unrelated transactions and the relief sought as to each count is separate and distinct. Before the distinction was abolished, one would have been an action at law and the other one an action in equity.

Rule 54 (b) of the Rules of Civil Procedure expressly provides that when more than one claim for relief is presented in an action the court may at any stage determine the issues as to a particular claim and enter a judgment disposing of that claim. This the lower court did in entering the judgment dismissing Count II of the appellant's complaint, which completely disposed of the controversy between the parties as to the alleged contract about the will (R. 47-48). For practical purposes the judgment of the court below effectively disposed of Count III, also, since any right of the appellant against the defendant Hamer depended upon complete success in maintaining the cause of action contained in Count II of the complaint. It is respectfully submitted that such a judgment is a final judgment from which an appeal to this Court will lie. *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (1939).

In the case just cited plaintiff sued the defendant for infringement of copyright and unfair competition arising from defendant's production of the motion picture "Test Pilot." The plaintiff claimed that the motion picture infringed the copyright of his book called "Test Pilot" and that the release of the picture was unfair competition, as he claimed that the title of the picture would deceive the public into believing that the picture was based on the book with the consent of the plaintiff. The Court granted the defendant's motion to dismiss the first cause of action on the grounds that it did not state facts sufficient to constitute a cause of action. The second cause of action was not then brought to trial and the plaintiff appealed from the order dismissing the first cause of action. The Circuit Court of Appeals for the Second Circuit expressly overruled its own earlier decision in *Sheppy* v. *Stevens*, 200 F. 946 (1912), and held that the appeal would lie. The Court took the position that with the unlimited joinder of claims between one plaintiff and one defendant authorized by Rule 18, courts must be granted extensive discretionary power to expedite the determination of the issues and avoid delay and inconvenience and that this was provided for by Rule 54 (b) conferring power on the courts to enter separate judgments at various stages. In its opinion (p. 85) the Court states:

> "They (the new Rules) indicate a definite policy to treat a judgment on a separate claim as so far final that it may be enforced by execution. It would clearly be held appealable if capable of immediate enforcement. * * * It seems unlikely that such a judgment, whether or not enforceable, is not to be regarded as final for purposes of appeal."

The concurring opinion of Judge Clark in the *Collins* case is most interesting in view of the leading part taken by him in the formulation of the new Rules.

In the case at bar the judgment dismissing Count II of the appellant's complaint completely ended the litigation

as far as concerned the cause of action for specific performance of or damages for the breach of the contract not to change a will. That cause of action was a separate and distinct cause of action not depending upon the other causes of action of the complaint.

In its opinion in *Collins* v. *Metro-Goldwyn Pictures Corp., supra* (p. 86), the Circuit Court of Appeals for the Second Circuit indicates that the District Judge must use his discretion in granting final judgments from which appeals may be taken so as not to force the Circuit Courts of Appeals to decide issues piecemeal, unless such disposition prevents undue delay. In the case at bar that discretion, it is respectfully submitted, was wisely exercised since the determination on appeal of the validity of the contract not to make a will, set forth in Count II of the complaint, will decide the one big issue which, when decided, will in all probability permit a settlement of all the controversies between the appellee and the appellant. While the appellant's cause of action on the promissory note in Count I involves a separate and distinct transaction and presents distinctly separable legal and factual problems, it is obvious that this cause of action would become of no importance if the appellant should be successful as to Count II, under which appellant claims to be entitled to the entire net estate of her mother because of the latter's contract not to change her former will which was in appellant's favor.

The Second Circuit is not alone in holding that a judgment completely disposing of one of several causes of action is a final judgment from which an appeal to this Court will lie. The Circuit Court of Appeals for the Fourth Circuit, in *Bowles* v. *Commercial Casualty Ins. Co.*, 107 F. (2d) 169 (1939), wholeheartedly endorsed the *Collins* case when it said (p. 170):

> "The better opinion seems to be that a judgment finally disposing of one cause of action is appealable although other causes of action are not disposed of. Collins v. Metro-Goldwyn Pictures Corp., 2 Cir., 106 F. 2d 83."

The *Collins* case has also been cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Florian* v. *U. S.*, 114 F. (2d) 990 (1940).

In addition to the error of the Circuit Court of Appeals for the Fifth Circuit in dismissing petitioner's appeal, we respectfully urge that a writ of certiorari be granted since there appears to be a square conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit and the decision of the Circuit Court of Appeals for the Second Circuit in the *Collins* case, *supra*, which was endorsed by the Circuit Court of Appeals for the Fourth Circuit in the *Bowles* case, *supra*, and by the Circuit Court of Appeals for the Seventh Circuit in the *Florian* case, *supra*. The question of the finality of a judgment disposing of one of several causes of action is a question of general concern to the Bar as to which it is respectfully submitted the Bar might well have the benefit of a decision by this Court.

Respectfully submitted,

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